Northeast Iowa Telephone Company *and* Teamsters Local 421, affiliated with the International Brotherhood of Teamsters, Petitioner. Case 18–RC–17190

April 30, 2004

ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election. The request for review is denied as it raises no substantial issues warranting review.

The Employer provides telephone service in rural Iowa from its two facilities in Monona and Decorah. The Monona facility provides traditional wire-line telephone service, wireless internet service, cell phone service, and the telephone services generally associated with a local exchange carrier. The Monona facility employs four technicians who perform in-ground installation to provide telephone services to the Employer's rural customers, manage the local exchange switch, install cable television equipment, and perform site surveys for and install wireless internet service. The Monona facility also employs a plant manager and a wireless manager.

The Decorah facility operates largely as a retail store located in an area where the Employer is not a local exchange carrier. The Decorah facility employs two technicians who install telecom equipment, telephone systems, jacks, and wiring for its customers in the area. One of the two Decorah technicians is dubbed the lead technician.

The Petitioner petitioned for an employerwide unit covering the Employer's technicians, office clerical employees, the plant manager, and the wireless manager. In his Decision and Direction of Election, the Regional Director (1) found the petitioned-for employerwide multifacility unit appropriate, (2) found the lead technician not to be a statutory supervisor, and (3) found the record inconclusive with respect to the plant and wireless managers' status and allowed them to vote under challenge. In its request for review, the Employer renews its arguments that the petitioned-for multifacility unit is inappropriate and that the lead technician is a statutory supervisor. With respect to the two managers, the Employer argues that (1) "the abundance of record evidence" shows that they are both statutory supervisors, and (2) if the Board agrees that the evidence is inconclusive it should reopen the record to permit the testimony of General Manager Arlan Quandahl.[1]

Although we find that the Employer's request for review fails to raise issues warranting review, we write separately on the supervisory issue to respond to our dissenting colleague. We find, contrary to our dissenting colleague, that the Regional Director did not err in allowing the two managers to vote under challenge. The challenge procedure is a well-established method through which the Board ensures the speedy running of representation elections. See, e.g., *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983) (finding no error in Board's decision to allow alleged supervisors to vote under challenge and noting "[s]uch a practice enables the Board to conduct an immediate election").

Our dissenting colleague contends that because the supervisory status of the two managers remained unresolved at the time of the election, the employees could not cast an informed ballot because they did not appreciate the contours of the unit. We find no merit in this contention.

First, the Employer in its request for review does not raise this contention. Thus, the Employer provides no evidence that any employees were confused about the contours of the unit or that their votes could be affected by the uncertainty of whether the two managers were included or excluded from the unit.

Further, the Employer failed to file a special appeal with the Board of the Regional Director's decision to schedule the hearing on October 27 and failed to request a postponement of the hearing to allow the general manager to testify. Nor did the Employer file an appeal with the Regional Director or the Board of the hearing officer's closure of the record without the general manager's testimony. Under these circumstances, we find the Employer's request to reopen the record to allow the general manager's testimony, first raised in its request for review, untimely.

[1] The Regional Director scheduled the hearing on October 27, a date on which Quandahl was unavailable to testify due to his recuperation from surgery.

Finally, we do not agree with our dissenting colleague that the Regional Director's decision to allow the two managers to vote under challenge somehow compromised employee free choice in the election. Our dissenting colleague mistakenly relies on *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986). *Parsons School of Design* represents a line of decisions holding that where an election has been held in a certain unit and the Board significantly alters the scope and character of that unit after the election, the employees' voting rights have been hampered such that a new election is required. See *Pratt & Whitney*, 327 NLRB 1213, 1218 (1999). These cases have consistently been limited to situations where the unit described in the election notice differs from the unit eventually certified in some significant way. See *Parsons School of Design*, 793 F.2d at 508 (postelection unit excluded all full-time faculty leaving only part-time faculty in the unit); *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir. 1984) (postelection unit reduced by 50 percent); *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294 (9th Cir. 1985) (postelection unit reduced by nearly 40 percent). The issue of unit scope is simply not raised where the Board makes supervisory findings in postelection proceedings. See *Morgan Manor Nursing & Rehabilitation Center*, 319 NLRB 552, 553 (1995) (finding postelection 20-percent reduction in unit size due to exclusion of statutory supervisors not a "sufficient change in unit size to warrant setting aside the election").

We see no reason to stretch, sua sponte, the court's holding in *Parsons School of Design* and to limit the Board's use of the tried-and-true "vote under challenge procedure" to essentially remedy the Employer's failure to file a timely request for special permission to appeal. The Board has resisted past attempts to read *Hamilton Test Systems* and its progeny beyond the courts' narrow concern about the impact of a postelection change in unit scope and character. See *Pratt & Whitney*, 327 NLRB at 1218–1219 (rejecting argument that *Hamilton Test Systems* required a change in the Board's *Sonotone*[2] voting procedures). We see no reason to alter that course. Rather than setting aside the election, reopening the hearing, and rerunning the election—as our dissenting colleague suggests—we find, given the case's present posture, that resolving the supervisory issues through the challenge and objection procedure is the best use of the Board's limited resources. While we recognize that allowing 25 percent of the electorate to vote subject to challenge is not optimal, the Employer's opportunity to raise its supervisory issues remains preserved through appropriate challenges and objections to the election or through a subsequent unit clarification petition.

Dated, Washington, D.C. April 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I would grant review of the Regional Director's decision to allow the plant manager and the wireless manager to vote subject to challenge.

This is a case where undue haste led to an inadequate record which, in turn, led to a situation where employees are asked to vote without knowing significant aspects of the composition of the unit.

The petition in this case was filed on October 10, 2003. Before the hearing was scheduled, the Employer advised the Regional Director that its general manager was unavailable for a 2-week period due to surgery and convalescence. The Employer reasonably anticipated that the general manager's testimony would be highly relevant to the issues of supervisory status presented by the case, and, therefore, requested that the hearing not be set during that time. Nevertheless, the Regional Director scheduled the hearing for October 27, during the period when the general manager was unavailable.

In his November 7 Decision and Direction of Election, the Regional Director concluded that the evidence regarding the status of the plant manager and the wireless manager was inconclusive. This was not surprising in view of the absence of the general manager's testimony. However, rather than reopening the hearing, he directed that those two individuals be permitted to vote subject to challenge. As there were only six other eligible voters in the unit, the two managers comprised 25 percent of the electorate. The election was conducted, as scheduled, on December 3.

The Employer's request that the hearing not be scheduled during the 2-week period of the general manager's unavailability was a reasonable one. The Regional Director should not have denied it. However, there was no special appeal of the Regional Director's decision, and, thus, that error cannot itself be corrected. However, there were errors subsequent to that one. The Regional Director compounded his error by choosing to go forward with the election rather than reopening the hearing.

[2] 90 NLRB 1236 (1950).

On November 7, when the Regional Director issued his decision, the petition was less than 1-month old. Surely it would not have compromised the efficacy of the Board's representation process to reopen the hearing, and to allow the general manager's potentially dispositive evidence to be presented. But the Regional Director nevertheless forged ahead.

As noted, I recognize that the Employer did not request a special appeal on the failure to postpone the hearing. But that is not the issue which concerns me. I am concerned about the fact that, without the general manager's testimony, the Regional Director did not have enough evidence to resolve the issues concerning the two managers. The Regional Director's solution to that problem was to vote the managers under challenge. That decision is the subject of this Request for Review. For the reasons stated herein, the Employer is correct.

The result of the Regional Director's decision is that the voters went to the polls not knowing whether the plant manager and the general manager were part of the unit. Although the "vote-under-challenge" procedure can be a reasonable accommodation of the conflicting demands facing the Board, I believe that it is incorrect to use it in a case like this one, where the individuals in limbo constitute such a large percentage of the unit. Employees have a right to know the contours of the voting unit before casting their ballots. Reviewing courts have not hesitated to invalidate elections where use of the "vote-under-challenge" procedure has trenched on that right. See, e.g., *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), and cases cited.

Although those court cases presented issues of unit scope rather than unit placement, the same considerations are applicable here, where the disputed individuals comprise such a large percentage of the overall unit. The individuals here may well be supervisors or, at the very least, they may reasonably be perceived as supervisors.[1] Most of the undisputed unit employees work for one or the other of the two disputed individuals. In these circumstances, in order for employees to intelligently decide whether they wish to be represented by the Union, they may reasonably want to know whether 25 percent of the unit will be comprised of these individuals.

My colleagues assert that there was no evidence that employees were in fact confused. However, the issue is not the subjective reaction of employees; nor is it whether the employees were in fact confused. The test is whether, objectively speaking, an employee would reasonably wish to consider, in casting his ballot, whether the two managers would be in their unit or not.

Again, I do not quarrel with the principal underlying the "vote-under-challenge" procedure.[2] But where the impact on the unit can be so substantial, I would not use it. Accordingly, I dissent.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

[1] The evidence shows that the two disputed individuals play a significant role in hiring, the determination of wage rates, and assignment of work. They have the authority to compel overtime. In addition, there was testimony that the two individuals have the same authority as the office manager, who the parties stipulated was a supervisor.

[2] Even my colleagues concede that the high figure of 25 percent is "not optimal."